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In The

Supreme Court of the United States

October Term, 1979

No. 79-1017

CHARLES SORKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1979

No.

CHARLES SORKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioner Charles Sorkin petitions this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review its affirmance of a judgment of the United States District Court for the Eastern District of New York, convicting the petitioner of violating 26 U.S.C. §7206(2) [aiding and abetting the filing by Mutual Advancement Corp. (MAC) of false and fraudulent federal corporate income tax returns for the years 1973 and 1974], after trial before Honorable Henry J. Bramwell and a jury.

A motion for a rehearing was denied on November 28, 1979, and the judgment itself was affirmed on September 21, 1979.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals, Second Circuit is reproduced as an appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The court below rendered its initial decision affirming the judgment of conviction on September 21, 1979. A petition for rehearing was then considered by the United States Court of Appeals for the Second Circuit, but was ultimately denied on the 28th of November 1979. (The orders thereon are reproduced in the appendix, *infra.*)

QUESTIONS PRESENTED

1. Whether in a criminal trial, the United States Attorney is limited to proving matters within the purview of the bill of particulars which it has furnished to the defendant?

2. Whether petitioner was denied a fair trial when the prosecution failed to update its bill of particulars upon learning that he would call certain witnesses and produce certain exhibits which had never previously been revealed in the original bill of particulars, and consequently took the petitioner by complete surprise at trial? (Fifth Amendment, United States Constitution - Due Process).

(A) The court below held that this was improper on the part of the Government and we ask this Court to determine whether such impropriety should be punished as a cause for reversal of the conviction?

3. Whether the evidence adduced by the prosecution was sufficient as a matter of law to have warranted presentation of the case to a jury for its deliberations?

4. Whether the "trial by ambush" tactic of the prosecution, in producing evidence which was never mentioned in the bill of particulars, warrants reversal under the supervisory powers of this Court over lower federal tribunals? (*Mesarosh v. United States,* 352 U.S. 1, 9, 14).

(A) Since the court below similarly held that it had been improper for the prosecutor to have presented his case in the manner aforesaid, whether due regard for the principles of justice and due process of law require reversal rather than a mere oral admonition in an opinion of such a prosecutorial tactic? [*Lee v. Florida,* 392 U.S. 378; *United States v. Baum,* 482 F. 2d 1325, 1331 (2 Cir. 1973).]

5. Whether petitioner Sorkin was denied due process of law and a fair trial by the tactic of the trial prosecutor in seemingly arranging a plea bargain for petitioner to plead to a misdemeanor during the trial, and then reneging thereon after the defendant had substantially testified in his own behalf under the belief that the case was just about over for him and after his defense attorney put in a perfunctory summation, also thinking that the case had been resolved and a plea would ultimately be forthcoming? (Fifth Amendment, United States Constitution; *Berger v. United States,* 294 U.S. 78, 88; and *Santobello v. New York,* 404 U.S. 257).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution; 26 U.S.C. §7206(2); and Rule 7(f), Federal Rules of Criminal Procedure, are involved.

FACTUAL BACKGROUND

Although the prosecution was against two defendants, namely Thomas J. Carlough and Charles Sorkin, the petitioner herein, only Charles Sorkin is pursuing this petition to the Supreme Court of the United States. In referring to the indictment, however, we shall use the term "defendants-appellants", with the understanding that this Court will realize that only Sorkin is a petitioner herein.

The indictment charged that the defendants-appellants aided and abetted each other in the preparation of false and fraudulent corporate income tax returns with respect to the Mutual Advancement Corporation (herein called "MAC"), for the fiscal years ending April 30, 1974 (Count I); April 30, 1973 (Count II). Carlough alone had been charged with respect to April 30, 1972, and that is not applicable to Sorkin at all.

Counsel for the defense had made motions, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, for a bill of particulars. The Government furnished a bill of particulars and a supplemental bill of particulars, indicating that all of the names of witnesses who would testify had been divulged, and also indicating that all of the exhibits it would use had been disclosed.

As it turned out, substantial evidence, through exhibits which had never been mentioned in the bill of particulars, was introduced at trial, and several witnesses were also called to the stand on behalf of the prosecution, the names of whom were never previously revealed.

Despite vehement protests and objections by the defense, the court nevertheless permitted this evidence to be adduced.

It is noteworthy that the court below found that this tactic was "improper", but nevertheless charged it up to a lack of

experience and judgment, despite the fact that prejudice of a substantial nature flowed to petitioner and his co-defendant at trial, Carlough.

Petitioner's involvement in the case was so tangential that it is difficult to understand why he was even named as a co-defendant. He was not an officer of MAC and did not participate in the day-by-day functions of that corporation.

Indeed, because of this very tangential involvement, a discussion was held on several occasions between defense counsel (Mortimer Todel, Esq.), and the prosecutor at trial, with respect to a disposition of the case as against Sorkin, by way of a misdemeanor plea.

As a matter of fact, the trial prosecutor, Lothar Genge and Mr. Todel, seemingly arrived at a firm plea bargain arrangement, during the testimony of the defendant in his own behalf (Sorkin). This also was shortly before the summation of the attorney for Sorkin and, consequently, both the attorney and Sorkin were lulled into a false sense of security that so far as Sorkin's case was concerned, it would never go the jury but rather would be disposed of by way of a plea to a misdemeanor.

The understanding between Sorkin's attorney and the assistant prosecutor was that Sorkin would continue testifying so that the case against Carlough could be completed.

Suddenly, and seemingly without warning, after improper preparation had been done for the summation by the attorney for Sorkin, and Sorkin's own testimony was colored by his belief that he was merely going through an exercise in futility, the prosecutor at trial informed Todel that his superior had not approved the disposition and that it could not be consummated.

While it is true that there had been an understanding that the approval of Genge's superior would have to be obtained, it

was never indicated that any difficulty would be experienced in so doing. All assumed this was a foregone conclusion.

In any event, there should have been an immediate revelation of the disapproval by the prosecutor to the defense, rather than the hiatus, which worked to the extreme prejudice of both of them. Thus, both defense counsel and Sorkin were severely prejudiced by working under the false assumption that the case had been resolved as against him.

During the trial itself, several witnesses and innumerable exhibits were introduced which had never been adverted to in the bill of particulars which the Government furnished and the Government indicated was complete in all respects.

It is noteworthy that the Second Circuit in its memorandum decision of affirmance noted that it had been "improper" for the Government to have failed to promptly update its bill of particulars upon learning that certain exhibits would be introduced and that certain witnesses would be called who had not been revealed in its bill of particulars.

In addition, the circuit court declared that this conduct also "evidenced a lack of appreciation for his responsibility [the prosecutor's] as an officer of the court".

Moreover, a witness by the name of Kenneth Sauer, a former bank official, testified, and introduced a number of exhibits which the Circuit Court found to be "both confusing and of doubtful relevance". Furthermore, the Circuit Court found that "similarly" its introduction was improper and also indicated "a possible lack of judgment and experience" (on the part of the prosecutor).

The petitioner maintains that certiorari should be granted not only because of the obvious failure to accord him a fair trial within the purview of the Due Process Clause of the Fifth

Amendment of the United States Constitution, but also because of the serious impact this case presents with respect to confining the Government to the parameters of its bills of particulars in criminal cases. It had been supposed that a bill of particulars concludes the parties to a criminal case, since it is certainly desirable and required, under due process, that a defendant charged with a crime be prepared to face these accusations and not suddenly be confronted with new accusations or unexpected witnesses about which he has never previously been informed *(Mesarosh v. United States,* 352 U.S. 1, 9, 14).

We incorporate by reference the briefs submitted to the court below.

REASONS FOR GRANTING THE WRIT

I.

The prosecutor tried this case "by ambush" since at trial a substantial amount of evidence and certain key witnesses were utilized, although no hint thereof was contained in the Government's main and supplemental bills of particulars. Since a bill of particulars is to enable an accused to prepare for trial and to prevent surprise, the Government should have been strictly limited to proving what it had set forth in those particulars. Unfortunately, the court permitted the prosecution to go well beyond the parameters of its particulars.

It should be noted, at the outset, that the United States of Appeals, although affirming the conviction herein, was extremely critical of the prosecution for their "improper" conduct and in their "lack of appreciation" of its "responsibility as an officer of the court" in the manner in which it presented evidence in the case at bar.

The prosecution had delivered particulars and a supplemental bill of particulars prior to trial. Notwithstanding

this, and notwithstanding the fact that it had informed the defense that the particulars were complete, and that all the witnesses who would testify had been named, nevertheless at trial, without prior notice, the prosecution placed two witnesses, Caiazzo and Sauer, on the stand, as a result of which very damaging testimony was introduced.

The testimony was not applicable to Sorkin, except in the sense that he was a co-defendant of Carlough. Caiazzo, for example, had testified that he had never performed services for the money he was paid from MAC. This, of course, was damaging testimony in the sense that it indicated that someone who was apparently being paid was rendering no services. However, the evidence revealed that Caiazzo was hired by a person other than Carlough or Sorkin, and that he in fact had never even met the defendants herein. Nonetheless, his evidence was permitted.

Sauer, an officer of a bank during the period of time covered by the indictment, testified as to innumerable completely irrelevant matters involving bank transactions primarily, which had nothing to do with the indictment herein. In fact, his entire testimony was totally irrelevant and could only confuse the jury.

In its decision, the court below specifically noted that the special attorney for the Government introduced extensive evidence, specifically mentioning Sauer by name "which was both confusing and of doubtful relevance".

Indeed, the court below affirmed solely on the basis that it found that there was sufficient other evidence warranting a conviction.

Under *Jackson v. Denno,* 378 U.S. 368, however, the general verdict of a jury cannot be read to mean that it predicated its action solely upon the admissible evidence. If there

was inadmissible or improper evidence adduced, then the entire verdict should fall because it is impossible from a general verdict to determine upon which evidence the jury decided to wrest its verdict.

Therefore, despite the fact that it described the Government's actions as "improper" and not "reasonable", the convictions were nevertheless affirmed.

In the light of such cases as *Mesarosh v. United States,* 352 U.S. 1, 9, 14, it certainly appears that this Court, under its supervisory powers over the conduct of lower federal courts, should certainly rectify this situation, lest this case be interpreted to mean that prosecutors can go right ahead and introduce improper evidence; go beyond their bills of particulars, and so forth, and nevertheless exit with impunity, because other evidence may be sufficient to warrant conviction.

See also, Coopedge v. United States, 369 U.S. 438, where the Supreme Court of the United States cautioned (*id.* at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, *eminently* fair and sober criminal law procedures. The *methods we employ in the enforcement of our criminal law* have aptly been called the measures by which the *quality of our civilization may be judged.*" (Emphasis ours.)

In *Mesarosh v. United States,* 352 U.S. 1, 9, 14, the Supreme Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus the Supreme Court declared:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Similarly, at an earlier time, in *McNabb v. United States,* 318 U.S. 332, the Supreme Court likewise declared:

> "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

Defense counsel had carefully preserved objections and exceptions as well, to the fact that the court permitted the prosecution to adduce testimony beyond the scope of the bill of particulars (836, 937-940, 1574).[1]

The court refused a charge request by the defense that he instruct the jury that the Government's proof must be limited to its bill of particulars (1574).

We must bear in mind that the entire testimony of Andrew Sauer was outside the scope of the bill of particulars. The testimony of Kenneth Caiazzo was particularly prejudicial

1. Numerals in parentheses refer to pages of the official court reporter's minutes.

because his testimony, if believed, might have been sufficient for the jury to return a verdict of guilty on all three counts. Clearly, admission of his testimony was certainly a "material variance" from the bill despite the government's claim that there was no variance from the bill (840). The fact that this witness was allowed over defense objections (825-827) and that his testimony was not stricken despite a defense motion to strike all material beyond the bill (937) should be enough to require the court to reverse the judgment.

In this regard, we maintain that the tactic of the Government was similar to the *trial by ambush* which had been condemned in such cases as *United States v. Baum,* 482 F. 2d 1325, 1331 (2d Cir. 1973).

Ironically, in the *Baum* case, it was the failure to reveal the identity of a Government witness which caused the court to reverse. Thus, in *Baum,* the court explained:

> "The failure to reveal Greenhalgh's identity until he was presented as a witness, confronted the trial judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned, and called for the reversal in *United States v. Kelly,* 420 F.2d 26, 29 (2d Cir. 1969). In the language of Judge Smith *'The course of the government smacks too much of a trial by ambush, in violation of the rules.'* To be sure, Baum's attorney did not make a very forceful showing in the district court of what cross-examination or rebuttal material he could secure. But in a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor.

> Here, no reason for nondisclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. Cf. *Roviaro v. United States,* 353 U.S. 53, 60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *United States ex rel. Wilkins,* 326 F.2d 135, 140 (2d Cir. 1964)" (Emphasis ours.)

To set this matter in proper context, it should be noted that the bill of particulars, particularly the supplemental bill of particulars filed by the Government, second paragraph thereof, stated succinctly as follows:

> "Detailed summaries of *all* fraudulent expense deductions and fraudulent payroll and pension deductions referred to in the instant indictment are attached. The specific payees and recipients, the dates of the alleged payments, and the amounts involved are set forth." (Emphasis added.)

Following was a list of the false employees and other deductions:

> "*Employees*
>
> LILLIAN BRUSE
> JOSEPH THOMAS
> JOHN CATALDO
> ROBERT CLINTON
> VINCENT PURO
> THOMAS SORESI"

Another heading in the bill of particulars was:

> "*Other Deductions*

> KEY DELTA
> ADVANCED AIR (or Lawrence Sturgess)
> MODERN SHEET METAL SUPPLY COMPANY"

The Government's bill of particulars was never amended, despite an effort to do so by the Government during the trial.

Nevertheless, the Government was permitted to produce four other witnesses, namely Jerome Rullo, Anthony Pinello, Angelo R. Solomine and Kenneth Caiazzo.

There were numerous objections throughout the trial with respect to the Government going beyond its bill of particulars, but to no avail (935 *et seq.,* 1574).

We have already set forth the motions that were made to dismiss because of this fact and the refusal of the court to even charge with respect to it (1574).

As we have explained previously, the prejudice, particularly, with respect to Kenneth Caiazzo, who testified that he performed no services for MAC and in fact never received any compensation, coupled with the fact that he received W-2 forms for the years 1972, 1973 and 1974, meant that he was necessarily involved in each and every count of the indictment.

Thus, his testimony alone would have been sufficient for the jury to find that the corporate returns in question were false. It was therefore essential that the defense should have been given particulars of this individual. That this was not done could only be equated to a *trial by ambush.* This was not merely cumulative evidence that could be brushed off.[2]

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2. Under *Jackson v. Denno,* 378 U.S. 368, we learn that a general verdict of a jury leaves in doubt what they believed or rejected. Thus, the verdict could have rested on Caiazzo alone, which accentuates the prejudice of withholding his identity until trial!

While we realize that ordinarily a minor or *de minimus* departure from the bill of particulars will not be grounds for reversal, we are setting forth in this Point the fact that severe deviations from the bill of particulars and substantial prejudice were wrought by the failure of the Government to fulfill its obligations with regard to the bill of particulars.

In *United States v. Glaze,* 313 F. 2d 757 (2d Cir. 1963), at 759, the court explained:

> "It is no doubt true that '[t]he function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise, and to the end the government is strictly limited to proving what it has set forth in it.' *United States v. Murray,* 297 F.2d 812, 819 (2d Cir.), *cert. dnied,* 369 U.S. 828, 82 S.Ct. 845, 7 L.Ed. 2d 794 (1962). See *United States v. Neff,* 212 F.2d 297, 309 (3d Cir. 1954). Courts must therefore view with suspicion attempts by parties to adduce proof of facts which modify or contradict assertions recorded in their bill of particulars."

In *United States v. Neff,* 212 F. 2d 297 (3d Cir. 1954) at 309, the court declared:

> "Bills of particulars in criminal cases in federal courts are governed by Rule 7(f) of the Federal Rules of Criminal Procedure, 18 U.S.C., which is substantially a restatement of well-settled principles. The latter establish that a bill of particulars 'Once obtained . . . *concludes the rights of all parties* who are to be affected by it, and he who has furnished the bill of particulars under it, must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special

> declaration.' Otherwise stated, a bill of particulars strictly limits the prosecution to proof within the area of the bill." (Emphasis ours.)

See also, 8 Moore's Federal Practice, 2nd Edition, Par. 7.061, pages 7-33 and 1 Wright Federal Practice and Procedure — Criminal Section 129, pages 292, *et seq.*

See also, United States v. Slaughter, 89 F. Supp. 205 (D.C.D.C. 1950); *Bryan v. United States,* 175 F. 2d 223 (5th Cir. 1949); *Rabinowitz v. Borish,* 43 F. Supp. 413 (D.C.N.J. 1942); *United States v. Glasser,* 116 F. 2d 690 (7th Cir. 1940), *reversed in part and affirmed in part,* 315 U.S. 60 (1942); *United States v. Adams Express Co.,* 119 Fed. 240 (D.C.S.D. Iowa 1902); *United States v. King,* 49 F.R.D. 51 (D.C.N.Y. 1970).

See also, United States v. Murray, 297 F. 2d 812, 819 (2d Cir. 1962), *cert. denied,* 369 U.S. 828; *United States v. Yarus,* 198 F. Supp. 425, 428 (D.C.N.Y. 1961); *United States v. De Pugh,* 266 F. Supp. 417, 421 (D.C.Mo. 1967); *United States v. Leonelli,* 428 F. Supp. 880, 883 (S.D.N.Y. 1977) and *United States v. Salazar,* 485 F. 2d 1272, 1273 (2d Cir. 1973), *cert. denied,* 415 U.S. 985.

See in addition, United States v. Lebron, 222 F. 2d 531, 535-536 (2d Cir.), *cert. denied,* 350 U.S. 876; *United States v. Crisona,* 271 F. Supp. 150 (S.D.N.Y. 1967).

From a reading of the trial transcript it is obvious that the trial judge herein refused to grant the motion to dismiss and apparently ruled that the Government had not violated any of the defendants' rights with respect to failure to supply information in the bill of particulars, as objected to.

In *United States v. Eissner,* 206 F. Supp. 103 (D.C.N.Y. 1962), the court aptly observed, at 105:

"A ruling based upon abuse of discretion seldom gives meaningful guide to the district court as to what is proper in particular situations. I am mindful that discretion, as Lord Mansfield outlined it, must not be arbitrary, vague and fanciful, but legal and regular. As stated in *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738, 862, 6 L.Ed. 204, 234, an important task in the exercise of discretion by a judge is to discern the course prescribed by law, and when that is discerned, it is the duty of the court to follow it. My discernment now is, upon reconsideration and reflection, that my previous restrictive interpretations in the net worth-expenditure cases allowing only the statement of a judicial principle of proof in the same manner as recital 'of the bare wording of a criminal statute' is not in accord with the recent trend of decisions in the Court of Appeals, Second Circuit. Recent decisions of that Court on problems of disclosure by the Government at the trial demonstrate a praiseworthy inclination to *strive for as many safeguards as possible in criminal prosecutions in this circuit in order that truth may be ascertained as fully as humanly possible. (United States v. Zborowski, 2d Cir., 271 F.2d 661; United States v. McKeever,* 2d Cir., 271 F.2d 669; *United States v. Giampa,* 2d Cir., 290 F.2d 83; *United States v. Hernandez,* 2d Cir., 290 F.2d 86; *United States v. Crosby,* 2d Cir., 294 F.2d 928, 950; *United States v. Freeman,* 2d Cir. 302 F.2d 347." (Emphasis ours.)

At page 106 of the *Eissner* opinion, the court added:

"There is increasing consideration being given in legal and judicial circles to the helpfulness that

might be gained in these complicated situations by the conduct of a criminal pre-trial. In my opinion, proper preliminary disclosure always clarifies and at times removes completely problems that complicate and slow down the trial. There is an interesting experience of this kind relating to the reluctance of certain Internal Revenue agents to divulge any information to a defendant indicted for income tax evasion and the good result finally obtained when such reluctance was overcome by discussion and persuasion. (Seminar on Procedures for Effective Judicial Administration, Dallas, Texas, (1961), 29 F.R.D. 191, 442.)

In the treatment of all these matters, it may be well to remember the high-minded philosophy of the Supreme Court 'not meant, I am sure, merely as a slogan, that *the interest of the United States in a criminal prosecution is not that it shall win a case but that justice shall be done.' (Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314.) The bill of particulars is not evidence of itself; it is merely a statement of what the government will or will not claim. *(United States v. Murray,* (1962), 2d Cir., 297 F.2d 812, 819.)" (Emphasis ours.)

The court, in *Eissner,* also observed:

"The procedures connected therewith are now liberalized, followed and taken for granted. *Jencks v. United States* (1957), 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103; 18 U.S.C.A. §3500 (1957); see also *Palermo v. United States,* 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287;

Campbell v. United States, 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed.2d 428; *Clancy v. United States,* 365 U.S. 312, 81 S.Ct. 645, 5 L.Ed. 574)."

II.

The court erred by permitting the testimony of Andrew Sauer, despite the fact that it was virtually irrelevant to the charges herein and completely prejudicial to the rights of the defendants. Sauer, a former bank official was permitted to relate how he authorized the converting of cash into checks and checks into cash, but without any nexus to this indictment whatsoever. It is beyond cavil that the prosecution used Sauer to interject prejudicial and irrelevant matters which could only confuse the jury.

Again we point to the fact that the court below found the testimony of Sauer should not have been admitted; that it was confusing and irrelevant. The court indicated that to a marginal degree it may have had some reflection on intent to defraud, but even the court below was not certain of that.

The Government sought to justify the use of Andrew Sauer as a witness by stating that his testimony (1) was needed in order to demonstrate that he was used to facilitate payroll payments to "no-shows" and (2) camouflage improper deductions on MAC tax returns, and (3) facilitate illegal pension deductions.

Notwithstanding the Government's assertions, they failed to prove or even establish any such course of action with respect to either of the defendants.[3]

Nothing illegal whatsoever, *vis-a-vis* MAC or either of the defendants, was proven or demonstrated. The only illegality was

3. The Government is required to establish relevancy and cannot rely on inferences or presumptions [*United States v. Benedetto,* 571 F. 2d 1246, 1248 (2 Cir. 1978); *United States v. O'Connor,* 580 F. 2d 38 (2 Cir. 1978)].

Sauer's failure to report certain cash transactions as required by federal regulations. Sauer apparently failed to file forms with respect to cash transactions that he engaged in as a banker (Form 4789 "Currency Transaction Report" is required to be filed with respect to certain cash transactions).

Virtually all of the testimony of Sauer was *dehors* the bill of particulars.

Sauer was the vehicle through which the Government introduced a number of checks before the jury. We submit these checks had nothing to do with criminality and had nothing to do with the charges in this indictment, and were solely to prejudice the defendants, which they did very well.

Of the sixteen checks referred to and introduced into evidence through Sauer, six (Exhibits 18, 22, 23, 24, 25 and 26) are dated *after* the date of the taxable year involved, and six (Exhibits 7, 21, 32, 33, 34 and 35) were negotiated after the date of the taxable year.

While four were written and negotiated within the dates of the taxable year they, too, were totally irrelevant to the case.

None of the checks were tied in with MAC deductions or with any criminality.

None of the Century Federal Bank drafts among the items, and none of the cash from Sauer, went to "no-shows".

Only Exhibits 22 and 28 were even remotely related to defendant Sorkin. The other exhibits referred to by Sauer are solely with reference to Carlough. None of the checks, however, indicate any criminality, and are certainly not relevant to this indictment.

To show that the Sauer testimony was not just *de minimus,* the following page references indicate places in the record where

Sauer testimony, or Sauer himself, is involved (21-A, 22-A, 23-A, 26-A, 315, 317, 414, 418, 445-509, 1047, 1051, 1178-1182, 1237, 1247, 1262, 1338-1350, 1354-1356, 1384, 1435, 1436, 1439, 1440, 1441, 1452, 1519, and perhaps in several other places).

Pages 21-A through 26-A refer to pages of the Assistant U.S. Attorney's opening, where he refers to Sauer and the bank for which he worked, and pages 1435 through 1519 refer to pages of Assistant U.S. Attorney Genges' summation and rebuttal. Thus, it is obvious that the Government placed great reliance upon the Sauer presentation.

To demonstrate how irrelevant and prejudicial the testimony was, we analyze Sauer's testimony as follows, in brief:

Exhibit 7 was a MAC check for $12,500 to Zuckerbrot dated April 19, 1974, cashed at Century Federal on July 22, 1974 (481, 482).

This item is *not mentioned in the bill of particulars;* it is not deducted as an expense by MAC; it was cashed after the date of the taxable year; it in no way relates to the indictment herein, which is false deductions on tax returns; and, Sorkin is not involved in any respect.

Zuckerbrot testified that it represented a return of half of his MESBIC investment and that he asked Carlough to cash it for him (Zuckerbrot, 98-100). The back of the check is obliterated so that the bank stamp is illegible (Sauer, 483), but this is totally irrelevant to the case (1049-1052).

MESBIC money was put into MAC after MESBIC was abandoned, as loans payable to MESBIC investors. This money does not affect the tax liability of MAC. On April 19, 1974, a series of MAC checks were written to MESBIC investors as partial payment of MESBIC investments. *See* Sauer Exhibits 21

(MAC check to Howard); 32 (MAC check to Stack); 33 (MAC check to Rubin); 34 (MAC check to Modern Sheet Metal Co.); and 35 (MAC check to Schichtman).

Exhibit 18 is a MAC check for $32,000 dated October 1974 signed and endorsed by Carlough and cashed by Sauer (476, 477). This check is dated after the date of the taxable year; *it is not mentioned in the bill of particulars;* it is not deducted as an expense by MAC; and it in no way relates to the indictment. Sorkin is not involved at all and, of course, to the extent Carlough is involved, it is not within the purview of the indictment, nor is it criminal.

The check does not appear on the books of MAC. Sauer said that the $32,000 was used to pay for a $16,000 check to Sturgis and a similar check to Hough (Sauer, 478, Exhibits 24 and 26).

Blum testified that the check did not appear on MAC books because it was an exchange (Blum, 334-348, Exhibits 19 and 19A).

The $16,000 checks to Sturgis and Hough were endorsed by the payees and deposited to MAC, thus completing the exchange.

Exhibit 20, a Century Federal check for $25,000 payable to Howard, dated June 17, 1973, and endorsed by Howard to SWIA, Local 400, also is *not mentioned in the bill of particulars.* It is not deducted as an expense by MAC. It is not even a MAC check. Thus, it, too, is totally irrelevant to the indictment and could only have been introduced to inject prejudice, confusion and irrelevancy.

The check was purchased with cash given to Howard by Carlough (Howard, 401-402). While the source of the $25,000 is not indicated, the money was certainly not from MAC, because

it does not even appear on the MAC books. Howard took the cash to Sauer, who issued the check (Sauer, 470).

While Howard at first claimed that Carlough gave him the $25,000 to buy the check so that Howard would appear to be an investor in Key Delta, it is obvious that there is no corroboration for this in the record (Howard, 401-404).

The endorsement on the check gives the lie to Howard's testimony since it is obvious that the check went to MESBIC, not to Key Delta (Howard, 425-426).

It was argued that Carlough gave the money to Howard for MESBIC, since if Carlough put the money in, Carlough would own a larger share in MESBIC than was permitted.

Exhibit 21 is a MAC check to Howard dated April 19, 1974, cashed by the teller at the Century Federal in July of 1974 (Howard, 420).

This item, again, is *not mentioned in the bill of particulars.* It is not deducted as an expense of MAC. It was cashed after the date of the taxable year. It does not, in any way, shape or form, relate to the indictment. Again, Sorkin is not involved in any way, and to the extent Carlough is involved, there is clearly no evidence of criminality or relevancy.

The fact that the back of the check was obliterated is totally irrelevant (1049-1052).

Howard said that the money came from Carlough for a side-business deal with an auctioneer (Howard, 420-423).

Exhibit 28 is a Century Federal check for $36,000 to Little Falls Laundry, dated December 26, 1973, paid for in cash. Again, this item is *not on the bill of particulars.* It is not deducted as an expense by MAC. The cash was not MAC

money and in no way does it relate to the indictment, which charges false deductions on the tax returns.

Sauer said that Sorkin brought the cash in excess of $10,000 and gave him a $500 commission for writing the check (Sauer, 461-465). Sorkin denied delivering the cash or the fee (Sorkin, 1350). This item was the subject of a mistrial motion made by Sorkin's lawyer, which the court denied (468-469).

It is interesting to note, and significant for this appeal, that originally the trial court indicated it would not permit the introduction of Exhibit 28 (328). Nevertheless, the court ultimately did admit it, asking that it be referred to as an amount in excess of $10,000 (464). Although the judge below indicated that he would instruct the jury that this item was not part of the charges, but was being used to show a pattern of cash dealings (470), no such instruction was ever given. This, incidentally, was the only cash dealing alleged as far as Sorkin was concerned, so the trial court *was incorrect* to refer to this item as showing "a pattern of cash dealings."

The judge ultimately was misinformed by Assistant U.S. Attorney Genge who told him that this check, payable to Little Falls Laundry, was relevant, because Little Falls Laundry was part of a consortium (318, 323, 327). This, of course, was not true. Little Falls had its own contract with the Department of Labor (945-949).

Exhibit 22, a Baldwin Liquidators check for approximately $69,000, probably dated around August of 1974, payable to Sorkin, again, is *not mentioned in the bill of particulars,* and is not on the books of MAC. It is therefore not deducted as an expense by MAC. The whole transaction occurred after the date of the taxable year. It is totally irrelevant to the indictment, which charges false deductions on tax returns.

Indeed, the endorsement upon the check is an obvious forgery since Sorkin was in Israel at the time the transaction

took place (Howard, 1181). In any event, it is totally irrelevant to the charges.

Exhibit 23, a Century Federal check for $25,000 payable to Mr. and Mrs. Sturgis, dated October 15, 1974, also is *not mentioned in the bill of particulars.* It is not deducted as an expense by MAC. There is no MAC check for the cash. It is dated after the date of the taxable year and in no way does it relate to the charges in this indictment. Sorkin is not involved in any way, and to the extent Carlough is involved, there is obviously no criminality nor relevancy.

While Sauer said the check was drawn on Carlough's behalf, and that he did not know if a MAC check or cash was used to buy it (Sauer, 487-488), the court nevertheless permitted the introduction of the item.

The $25,000 represented money from Carlough loaned to Sturgis to use in Advanced Air. It was secured by a second mortgage on Sturgis' home.

Exhibit 24 is a Century Federal check for $16,000 to Mr. and Mrs. Sturgis, dated November 18, 1974. This was, no doubt, a typographical error, since it should be October 18, 1974 (478).

Once again, this item was *never mentioned in the bill of particulars.* It is not deducted as an expense by MAC, and it is dated after the date of the taxable year. Thus, it has no relevancy whatsoever to the charges herein. Sorkin is not involved at all and, to the limited extent that Carlough is involved, it does not indicate any criminality or impropriety. This check was part of an exchange and has nothing to do with MAC at all. The check, together with Exhibit 26, were deposited to MAC to complete an exchange (Blum, 335-348). *See also,* Exhibit 19 and 19A. The check has nothing to do with MAC and it is part of an exchange.

Exhibit 25 is a Century Federal check for $25,000 to Mr. and Mrs. Hough dated October 15, 1978. This check was a loan by Carlough to Hough and was secured by a $25,000 mortgage on Hough's home. It was to permit Hough to use it in connection with Advanced Air. Sauer said this check was drawn on Carlough's behalf and he did not know if a MAC check or cash was used to buy it (Sauer, 487-488).

Once again, this is an item that was *not mentioned in the bill of particulars.* It is not deducted as an expense by MAC and there is no MAC check for this money. It is dated after the date of the taxable year, and it does not, in any way, shape, or form relate to the charges herein. Sorkin is not involved and, to the extent Carlough is mentioned, there is no indication of criminality.

Exhibit 26 is Century Federal's check for $16,000 to Mr. and Mrs. Hough, dated November 18, 1974, which is a typographical error, since it should be dated October 18, 1974 (Sauer, 478).

This item, again, is *not mentioned in the bill of particulars.* It is not deducted as an expense by MAC. It is dated after the date of the taxable year and it does not, in any way, shape or form relate to the charges herein. Sorkin is not involved in any way, and to the limited extent Carlough is mentioned therein, it is not indicative of any criminality at all. Like the others, this had no relevancy to the case, other than to confuse and prejudice the jury.

Sauer said that this check, and also Exhibit 24 (Century Federal's check for $16,000 to Mr. and Mrs. Sturgis), were paid for by a $32,000 MAC check (Exhibit 18), payable to Carlough and signed and endorsed by Carlough (Sauer, 478).

The check, together with Exhibit 24, were deposited to MAC to complete an exchange (Blum, 335-348, Exhibits 19 and

19A). The check, therefore, had nothing to do with MAC; it was simply part of an exchange.

Exhibits 29 and 30 were Century Federal's checks for $10,000 and $15,000 to Stack dated October 28, 1973 and February 1973.

This item, again, is *not on the bill of particulars.* It is not deducted as an expense by MAC. There is no MAC check for this money. In no way does it relate to the indictment. Sorkin was not involved in any way and, to the limited extent Carlough is mentioned, it is without any attachment of liability or criminality.

Sauer said the checks were given to Carlough at Carlough's request and that he could not say whether they were issued for cash or checks (480-481).

Stack said that they were endorsed with a facsimile (573) and that he did not receive the proceeds of these checks (571).

Exhibit 32 is a MAC check for $20,000 to Stack dated April 19, 1974. This item, again, is *not on the bill of particulars.* It is not deducted as an expense by MAC, and it is therefore totally irrelevant to the charges herein.

Stack said that it was part return of money he had invested in MESBIC. Sauer said the check was negotiated at the bank (485).

The MESBIC money was put into MAC (after MESBIC was abandoned) as loans payable to MESBIC investors; the money does not effect tax liability on MAC. On April 19, 1978 a series of MAC checks was written by Carlough to MESBIC investors as partial payment of their MESBIC investment (*see* Sauer Exhibits 7, 21, 33, 34 and 35).

Exhibit 33 is a MAC check to Rubin dated April 19, 1978. This item is *not in the bill of particulars.* It is not deducted as an expense by MAC. It had no relationship whatsoever to the indictment. Sorkin is not involved in any way and, to the limited extent Carlough is involved, it is without any indication of criminality.

Again, while the money from MESBIC was put into MAC, after MESBIC's abandonment, as loans payable to MESBIC investors, the money does not affect the tax liability of MAC at all because, as we have indicated previously, on April 19, 1978, a series of checks were written by Carlough to MESBIC investors, as partial payment of their MESBIC investment (*see* Sauer Exhibits 7, 21, 32, 33, 35).

Exhibit 35 is a MAC check to Michael Schichtman dated April 19, 1974. This item is *not in the bill of particulars.* It is not deducted as an expense by MAC. It has nothing to do with the indictment herein. Sauer said that the check was negotiated at the bank (Sauer, 485). Schichtman said it was endorsed with a facsimile signature that Carlough had (Schichtman, 609). Schichtman further declared that he did not receive the proceeds of the check (609).

As we indicated before, this was MESBIC money and MESBIC money was put into MAC as loans payable to MESBIC investors, and that money was returned in a series of checks (*see* Exhibits 7, 21, 32, 33, 34).

From the foregoing it is obvious that the testimony of Sauer introduced so many exhibits that were totally irrelevant to the indictment, and so wholly prejudicial and confusing, that it would have been impossible for any jury to understand what the significance of that testimony was, because it had no significance to these charges at all. It is clear, we maintain, that the court

erred gravely in admitting these exhibits and testimony over objection.[4]

III.

As another adjunct of the tactic of the Government of using "trial by ambush", the prosecution called four witnesses who were so-called "no-show" employees whose names were never mentioned in the bill of particulars. Sorkin had nothing whatsoever to do with any of the "no-shows" since he did not hire them and had no say in their hiring. Carlough had, in fact, given tasks to these employees, with the exception of Kenneth Caiazzo, who, as we indicated previously, was unknown to either defendant, but was hired by John Cammerato.

Defendant-appellant Sorkin had nothing to do with any of the "no-shows", since he had nothing to do with their hiring under any circumstances.

Carlough, on the other hand, was involved with some of them, and with those that he did have contact with, it was obvious that they did have tasks, such as union organization work, training and so forth. The one exception to this was Kenneth Caiazzo, as we have indicated before, but he never had any contact with either defendant and, in fact, was unknown to both of them. He had been hired by John Cammerato.

These four individuals, to whom we have adverted previously and who were never mentioned in the bill of particulars, were another source of surprise during the trial to the defendants, and was another manifestation of the tactic of "trial by ambush" (*see United States v. Baum, supra)* that the Government utilized.

4. We wish this Court to note that we are including by reference all of the arguments made in the court below, as contained in the briefs and reply briefs and motions for rehearing. We are certain that this Court has facilities to avail itself of such material.

The payroll was prepared from vouchers and submitted to Kunick. The employees were added to the payroll at the discretion of appellant Carlough, not Sorkin (153).

The alleged "no-shows" called by the Government indicate that they were hired by Carlough (Soresi, 275, 287; Puro, 291, 299, 303; Clinton, 371, 391; Thomas, 745).

In an attempt to prejudice the jury, the Government called four other witnesses none of whom were mentioned in the bill of particulars, as we have indicated. These were Rullo, 702-721; Pinello, 721-727; Solomine, 727-734 and Caiazzo, 842..

Since Sorkin obviously had no knowledge of "no-shows", it follows that he had no knowledge of alleged illegal payroll deductions, and *a fortiori* was unaware of any impropriety with respect to pension deductions.

That is not to say that Carlough was in any way liable or criminally involved, since with the exception of Caiazzo all these people did do work.

The Labor Department representative, Castellani, had previously testified that *since employees were certified by the consortium, MAC ordinarily had no knowledge of what they were doing anyway.*[5]

Caiazzo testified that he never received any pay and he did no work. W-2 forms, however, were issued for him and deductions taken.

Since neither Carlough and Sorkin had ever met him, and he was hired by John Cammerato, and not by either of the

5. In his grand jury testimony, agent Dioguardi, who was in charge of the investigation, testified that he could not connect Sorkin with any of the false employees (Dioguardi, Grand Jury, 9-8-14).

appellants, the testimony of this individual, who was not named in the bill of particulars, was very prejudicial since the jury could have convicted on the basis of his testimony alone.

We maintain, however, that this type of testimony was incredible to attribute to the defendants. Caiazzo himself admitted that he had never met either of the defendants.

But the ingredient of having left his name out of the bill of particulars, and then introduce his testimony at trial, was so prejudicial as to warrant a vacating of the conviction, irrespective of any other error in the case.

This is equally true with regard to the Sauer testimony and the numerous exhibits introduced through him.

IV.

The defendant-appellant Sorkin was severely prejudiced by a breach of understanding and by a "sandbagging" tactic used by the prosecution in connection with a plea bargain that was being negotiated toward the end of trial on behalf of Sorkin. The Government led the attorney for Sorkin, and Sorkin himself, down a "primrose path", thinking that they had a plea to a misdemeanor settled when, in fact, it never took place. On account of this belief, however, defense counsel for Sorkin did not adequately prepare for summation, and a substantial portion of Sorkin's own testimony was motivated by his belief that it was a meaningless exercise in futility since he was going to plead guilty anyway.

The record is replete with inferences to the fact that there were plea negotiations between Sorkin, counsel for Sorkin, and the Government, permitting him to plead out to a misdemeanor.

The most virulent of these instances, however, occurred toward the end of the trial when the Government, in negotiating with defense counsel, indicated that a plea would in all

likelihood be accepted after the jury heard all of the testimony in the case, including the summations. This was so as not to affect the Government's case against Carlough (1399-1401). This offer was communicated to the defendant through his attorney, Mortimer Todel (a former Executive Assistant United States Attorney in the Southern District).

As the papers filed in the case indicated, together with the record, after Sorkin was apprised of this offer, he informed his lawyer, by telephone, to accept the plea.

Defense counsel for Sorkin indicated in filed papers that he was in the middle of preparing his summation, and after being informed that his client would accept the plea offered, he desisted and said, in effect, "Good, now I can stop working on this summation and get some sleep."

The following morning counsel informed the Government that the offer was accepted and was told that Mr. Genge (the assistant in charge of the prosecution) had informed his superior, Mr. Puccio, by telephone, of the matter and was going to see him again face-to-face.

Since the plan was to complete the case so as not to prejudice the jury's thinking about Carlough, Sorkin resumed the stand and completed his testimony, with the knowledge that his case would not go to the jury because he believed that a plea bargain had been consummated. Obviously, Sorkin believed that his testimony was an exercise in futility and a mere formality.

This false sense of security, into which he was lulled, disarmed Sorkin and made him somewhat blase about his testimony altogether.

Later in the day the defense rested, and still thinking that everything was a *fait accompli,* summations were articulated.

It is obvious that there was certainly, at the very least, a grave misunderstanding. This Court should not permit this type of unfairness to go unremedied.

In *Santobello v. New York,*[6] 404 U.S. 257 (1971), the Supreme Court of the United States said that the left hand must know what the right hand is doing in the prosecutor's office. In this case, we maintain, it is inferable that Mr. Genge, the Assistant U.S. Attorney, led the defense astray, and gave the complete impression that a plea bargain had been arrived at. While it is true that he indicated he would have to speak again to his superior, Mr. Puccio, he had no right to allow the defense to think that the plea bargain was virtually consummated. He should have disabused counsel of any such thought well in advance of his preparation for summation. He should have apprised the defendant before he took the stand again. None of these things were done. While we dislike using terms such as "sandbagging", we believe that the metaphor is apt.

Santobello, supra, made it plain, however, that the core concept is the constitutional right of the defendant to be treated with "fairness" (*see Cooper v. United States,* ___ F. 2d ___, decided March 5, 1979, 4th Cir., Docket No. 77-2288). *See generally,* P. Westen and D. Westein, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Calif. L. Rev. 471 (1978).

The *Cooper* case is a recent decision of the Fourth Circuit, which goes into great detail in announcing its determinations with respect to broken plea bargains.

Referring to the case of *United States v. Carter,* 454 F. 2d 426, the Fourth Circuit, dealing with a case where one Assistant U.S. Attorney rejected a plea bargain made by another, observed, quoting the language of *Carter* (454 F. 2d at 428):

6. Argued by the writer of this brief.

> "There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice . . ."

See Lutz v. C.I.R., ___ F.2d ___ (6th Cir. 2/22/79, Docket No. 79-725).

It has been held that a plea bargain, even if not actually struck, may result in a grave misunderstanding effecting the rights of one or both parties. Where such a grave misunderstanding does occur, the verdict and judgment must be set aside. (*See People v. Forlano,* 19 App. Div. 2d 365; *People v. Granello,* 18 N.Y. 2d 833; *People v. Vignera,* 29 App. Div. 2d 657; and *Santobello v. New York, supra.*)

In *Shelton v. United States,* 246 F. 2d 571 (5th Cir.), the case was reversed *per curiam* because "The plea of guilty may have been improperly obtained". Although converse here, the principle is similar.

See also, Sorrells v. United States, 287 U.S. 435.

See too, Coopedge v. United States, 369 U.S. 438, where the Supreme Court of the United States cautioned (*id.* at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, *eminently* fair and sober criminal law procedures. The *methods we employ in the enforcement of our criminal law* have aptly been called the measures by which the *quality of our civilization may be judged.*" (Emphasis ours.)

In *Mesarosh v. United States,* 352 U.S. 1, 9, 14, the Supreme Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus the Supreme Court declared:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Similarly, at an earlier time, in *McNabb v. United States,* 318 U.S. 332, the Supreme Court likewise declared:

> "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

V.

This Court should grant certiorari and should then reverse the conviction in order to deter future conduct on the part of Government officials as displayed by the case at bar.

In *Lee v. Florida,* 392 U.S. 378, as well as in *Brady v. Maryland,* 373 U.S. 83, and other cases, this Court has made it clear that even the negligent or inadvertent misconduct or impropriety on the part of the Government will be dealt with severely.

In *Lee v. Florida, supra,* this Court was faced with the dilemma of prosecutors totally ignoring the Federal Communications Act. There was no remedy to ameliorate this problem since apparently no prosecutors were being prosecuted themselves. Accordingly, this Court held that the only means of deterrence was to eliminate the benefits that such prosecutors obtained by their misconduct by reversing the convictions.

In the case at bar, we maintain that this is the only sensible thing to do as well since admonishing a prosecutor that he has acted improperly and that he has done things he should not have done do not help the situation since in essence the prosecutor recognizes that he has "gotten away with it".

We maintain that the only deterrence that means anything to a prosecutor is to take away the conviction which was the end object in the means he employed which turned out to be improper.

The court below has already determined that the conduct was improper, but by some rather involved and casuistic reasoning, has determined that the conviction should stand anyway because there was other evidence warranting the finding of guilt.

We have already discussed the dilemma such holdings have within the purview of *Jackson v. Denno, supra,* where the general verdict of the jury cannot be analyzed to determine what evidence they relied upon.

We maintain therefore, that if this Court is to enforce a standard of conduct as set forth in *Mesarosh v. United States, supra,* and other cases, that the only reasonable deterrent is to invoke the cogent holding of *Lee v. Florida, supra,* and to reverse the conviction.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS DATED SEPTEMBER 21, 1979

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of September, one thousand nine hundred and seventy-nine.

Present:

HONORABLE J. EDWARD LUMBARD

HONORABLE WALTER R. MANSFIELD

HONORABLE MURRAY I. GURFEIN

Circuit Judges.

Filed Sep. 21, 1979
A. Daniel Fusaro, Clerk

Docket No. 79-1172

UNITED STATES OF AMERICA,

Appellee,

-against-

THOMAS J. CARLOUGH and CHARLES SORKIN,

Defendants-Appellants.

Upon this appeal by Thomas J. Carlough and Charles Sorkin from judgments of the District Court for the Eastern District of New York, entered on April 20, 1979, after a jury trial before Judge Henry J. Bramwell convicting appellants of aiding and abetting the filing by Mutual Advancement Corporation (MAC) of false and fraudulent federal corporate income taxes for the years 1972, 1973 and 1974 in violation of 26 U.S.C. §7206(2), the said judgments, after our examination of the record, reading of the parties' briefs on appeal, and hearing oral argument by counsel, are

AFFIRMED.

(1) There was ample evidence to permit the jury to find the two defendants guilty beyond a reasonable doubt, including testimony of numerous witnesses and records showing that appellants deducted from MAC's reported corporate income (a) salaries of various individuals who performed no services for MAC, (b) wages credited to various "no-show" or "phantom" employees who performed no services for MAC, and (c) payments of $67,500 to Key Delta Corporation, $30,000 to Modern Sheet Metal Supply Co., and $34,000 to Advanced Air Corporation for services not rendered. Moreover, assuming the last payment was a loan, it was not deductible as a bad debt in the absence of any showing of unsuccessful efforts to collect the debt or that the debt had become worthless, *Ludwig Bauman Co. v. C.I.R.*, 312 F.2d 557, 558 (2d Cir. 1963).

(2) The failure of the Special Counsel for the Government promptly to update its Bill of Particulars, upon learning that he would call certain witnesses (Caiazzo and Sauer) and that certain exhibits would be introduced, was improper and evidenced a lack of appreciation for his responsibility as an officer of the court. Similarly, the needless introduction by the Special Attorney of extensive evidence (e.g., portions of the testimony of Sauer and exhibits introduced through him) which

was both confusing and of doubtful relevance indicates a possible lack of judgment and experience. However, the independent evidence of appellants' guilt was overwhelming. Appellants failed to show any substantial prejudice from the variance between the Bill of Particulars and the proof. See *United States v. Glaze*, 313 F.2d 757, 760 (2d Cir. 1963). Appellants, moreover, failed to seek a continuance and had approximately 14 days after Sauer testified and 7 days after Caiazzo testified within which to subpoena rebuttal witnesses or documentary proof. Lastly, some of Sauer's testimony and supporting documents were relevant to the issue of appellants' fraudulent intent.

(3) Since negotiations between attorneys for a possible guilty plea by Sorkin to a lesser offense (misdemeanor) were expressly conditioned on obtaining the approval of the Government prosecutor's superior, which was not given, Sorkin's attorney was not reasonably justified in assuming that a plea bargain would result or in relaxing the vigor of his summation. Nor was there any unfairness on the Government's part in conducting such conditional negotiations during trial.

s/ J. Edward Lumbard
J. Edward Lumbard, U.S.C.J.

s/ Walter R. Mansfield
Walter R. Mansfield, U.S.C.J.

s/ Murray I. Gurfein
Murray I. Gurfein, U.S.C.J.

ORDER DENYING PETITION FOR REHEARING DATED NOVEMBER 28, 1979

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of November, one thousand nine hundred and seventy nine.

Present:

HON. J. EDWARD LUMBARD

HON. WALTER R. MANSFIELD

HON. MURRAY I. GURFEIN

Circuit Judges.

79-1172

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS J. CARLOUGH
CHARLES SORKIN,

Defendants-Appellants.

Order

A petition for a rehearing having been filed herein by counsel for the appellants' Thomas J. Carlough & Charles Sorkin.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro
Clerk.